

KEYWORD: Guideline F

DIGEST: Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. A clearance adjudication is aimed at evaluating an applicant's judgment and reliability. A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required for access to classified information. Applicant has not mitigated concerns arising from his dilatory tax filings. His explanation was that he simply forgot to file his returns three times, although he had remembered to file for extensions during each of the three years. Applicant provided no plausible explanation for why each time he requested an extension, he did not recall that he had yet to file for the previous year. Even if he lacked specific intent to avoid taxes, his conduct raises serious questions about his ability to comply with security rules that may be more exacting than filing of a tax return. Favorable decision reversed.

CASENO: 14-04437.a1

DATE: 04/15/2016

DATE: April 15, 2016

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In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
_____	)	

**APPEAL BOARD DECISION**

## **APPEARANCES**

### **FOR GOVERNMENT**

Bryan Olmos, Esq., Department Counsel

### **FOR APPLICANT**

*Pro se*

The Department of Defense (DoD) declined to grant Applicant a security clearance. On February 6, 2015, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On January 14, 2016, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mary E. Henry granted Applicant’s request for a security clearance. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge’s favorable decision contravened the weight of the record evidence and, therefore, was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

### **The Judge’s Findings of Fact**

The Judge made the following pertinent findings of fact: Applicant works for a Defense contractor. His supervisor lauds his work and states that he has a high level of integrity. A high school graduate, Applicant served in the Reserves from 1988 until 1993, after which he served in the National Guard until 1995. Applicant and his current wife married in 1996. The couple separated for a short time around 2013 or 2014. Applicant’s wife has managed the household finances. Although Applicant arranged to have some bills paid automatically, his wife did not understand that the authorizations had to be renewed.

When interviewed pursuant to his security clearance application (SCA), Applicant advised that he did not file his Federal income tax returns for tax years 2009, 2010, and 2012. Each year Applicant and his wife received an extension to file, yet forgot to file their returns. Applicant learned about their failure when he attempted to change the number of exemptions that were applied to his withholding and discovered that the IRS had placed a lock on his account. He does not recall the date upon which this occurred. The Judge prepared a chart based upon Applicant’s tax transcripts. Among other things, this chart shows that Applicant owed money each of the years that he did not file.

Applicant advised that he had been in touch with the IRS about paying his tax debt. He reached an agreement with the agency on June 2015 but discovered that it only covered tax years 2011 and 2012. He entered into a new agreement, whereby he will make payments beginning in November 2015, with an increase in the amount due a year later. The IRS issued a notice of levy for tax year 2011 but did not garnish Applicant’s income.

In an earlier SCA, completed in 2009, Applicant disclosed that he had failed to file his state income tax return for tax year 2004. He has subsequently filed the return and does not owe anything. There is no evidence in the record of credit counseling.

### **The Judge's Analysis**

The Judge stated that Applicant's "primary financial problem" was his failure to file his tax returns for three years. In mitigating this concern, she stated that he did not intend to avoid paying taxes, as evidenced by his having filed for extensions. She stated that he forgot to file the returns within the additional time. She stated that this showed a lack of responsibility and a failure to comply with his obligations as a U.S. citizen. She went on, however, to observe that Applicant had established a payment plan and has made the first of several payments toward satisfying his tax debt. In the whole-person analysis, the Judge cited to evidence that Applicant had paid a number of debts, including large ones for medical expenses. Concerning his tax debts, she stated that Applicant and his wife have taken steps to reduce any further tax liability and that he knows that he must remain aware of his duty to file Federal and state income tax returns. She stated that it will take time to pay off the tax liability but that it would not become a means through which Applicant could be pressured or coerced, insofar as he has sufficient funds available to resolve this debt.

### **Discussion**

There is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant has the burden of persuasion as to obtaining a favorable decision. Directive ¶ E3.1.15. The standard applicable in security clearance decisions "is that a clearance may be granted only when 'clearly consistent with the interests of the national security.'" *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See ISCR Case No. 14-02563 at 3 (App. Bd. Aug. 28, 2015)*.

Department Counsel's Appeal Brief focuses almost exclusively on Applicant's tax delinquencies. Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. *ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)*. As we have noted in the past, a clearance adjudication is not directed at collecting

debts. *See, e.g.*, ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. *See, e.g.*, ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). *See Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

Department Counsel argues that the record, viewed as a whole, does not support a conclusion that Applicant has mitigated concerns arising from his dilatory tax filings. We find this argument persuasive. Applicant's explanation was that he simply forgot to file his returns, not once but three times, although, as the Judge herself noted, he had remembered to file for extensions during each of the three years in question. Neither the evidence nor the Decision cite to a plausible explanation for why each time Applicant requested an extension, he did not recall that he had yet to file for the previous year. Even assuming that Applicant lacked a specific intent to avoid taxes, his conduct raises serious questions about his ability to comply with security rules that may, in the event, be more exacting than the filing of a tax return. Furthermore, one might have expected that Applicant's failure to file a state tax return in 2004 would have been sufficient to place him on notice of his legal responsibilities.<sup>1</sup>

Department Counsel cites to testimony which suggests that Applicant's unexplained forgetfulness extended beyond the tax years in question. He notes testimony that, after Applicant had learned of his problem in 2014, he changed the number of exemptions from his withholding, after which "it just went out of my mind." Appeal Brief at 5, quoting Tr. at 55. Applicant also stated that, once he had adjusted his exemptions, "it kind of went in the back burner[.]" *Id.*, quoting Tr. at 47. In other words, Applicant was placed on notice of his deficiencies by early 2014 at the latest, yet did nothing more than adjust his exemptions, after which he again forgot to follow through on his legal obligation. Indeed, he took no further action until he had received the SOR, despite having received a collection notice from the IRS in October 2014. The Judge's Decision does not explain why Applicant's dilatory actions suggest not so much occasional forgetfulness as an ongoing indifference to legal obligations. Neither does it address the extent to which the timing of Applicant's corrective action draws into question his willingness to follow rules and regulations for their own sake. *See, e.g.*, ISCR Case No. 14-01243 at 3 (App. Bd. Jun. 18, 2015).

Department Counsel cites to inconsistencies in Applicant's explanations. For example, Applicant testified that his wife always handled the family finances. "As far as I can tell from what she'd told me, she filed an extension and then it went out of her mind." Tr. at 32. From this one

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<sup>1</sup>"Applicant routinely chose not to file and pay his taxes, exhibiting that same conduct year after year. The Judge's acceptance of Applicant's excuse of forgetfulness is simply not credible in light of Applicant's remembering each year to file for an extension of time to file. Certainly, when he filed for an extension each April 15<sup>th</sup>, this act would have reminded him that he had not filed his return due the prior October 15<sup>th</sup> for the year before that. It is far more credible that Applicant failed to file his tax returns by the extension deadline because he knew that he had under withheld taxes on his income and could not afford to pay the difference." Appeal Brief at 13-14.

might conclude that during the time in question Applicant had no knowledge of the state of their taxes. In his interview, however, he advised that “each time, come October, *they* forgot to file their full taxes.” (emphasis added) Government Exhibit 3, Interview Summary, at 4. These two explanations are not totally consistent, in that the interview suggests that Applicant was more generally aware of the couple’s tax issues than he admitted in the quoted testimony, which tended to put the sole blame on his wife.

Applicant’s hearing testimony is inconsistent with other record evidence as well. In response to a question by the Judge, Applicant stated that he had become aware of his tax problems “right before my interview,” which was conducted in May 2014. Tr. at 33; GE 3 at 1. However, as Department Counsel notes, Applicant actually disclosed the filing delinquencies in his SCA, which was a month prior to the interview. GE 1 at 33. Moreover, he had received an IRS inquiry about the non-filing of his 2010 tax return as early as March 2012. Applicant Exhibit P. Again, the inconsistencies between Applicant’s testimony and his prior SCA answers, as well as the tax transcript that he himself submitted, undermine the credibility of his presentation. While we give deference to a Judge’s credibility determinations (Directive ¶ E3.1.32.1), that deference is not without limits. Where the record contains a basis to question an applicant’s credibility (inconsistent statements, contrary record evidence, etc.) the Judge should address that aspect of the record explicitly, explaining why he or she finds and applicant’s version of events to be worthy of belief. Failure to do so suggests that a Judge has merely substituted a favorable impression of an applicant’s demeanor for record evidence. *See, e.g.*, ISCR Case No. 10-09035 at 6 (App. Bd. Jun. 10, 2014). In the case before us, we conclude that the Judge’s failure to address the contrary evidence in the record undermines her favorable decision.

In summary, the record evidence shows that Applicant (1) had failed to file a state tax return in 2004; (2) failed to file Federal returns in 2009, 2010, and 2012; (3) claimed that he had neglected to do so because he simply forgot; (4) received notice of these failures no later than early 2014; (5) did not file his returns until after the SOR notified him that his clearance was in jeopardy; and (6) made statements that were inconsistent with his own prior statements and/or with other record evidence. Applicant’s evidence that he had made a single payment on a payment plan is not sufficient to outweigh the concerns arising from the cited evidence. The Judge’s favorable decision runs contrary to the weight of the record evidence.

### **Order**

The Decision is **REVERSED**.

Signed: Michael Ra’anan

Michael Ra’anan  
Administrative Judge  
Chairperson, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board